RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT - 3 2016
OFFICE OF THE CLERK

No. 16-149

IN THE

Supreme Court of the United States

COVENTRY HEALTH CARE OF MISSOURI, INC.,
Petitioner,

v.

JODIE NEVILS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR RESPONDENT

RALPH K. PHALEN
Phalen Law
4310 Madison Avenue,
Suite 140
Kansas City, MO 64105

MITCHELL L. BURGESS
Burgess Law Firm
4310 Madison Avenue,
Suite 100
Kansas City, MO 64111

JOHN CAMPBELL
Campbell Law, LLC
20 South Sarah Street
St. Louis, MO 63108

MATTHEW WESSLER
Counsel of Record
DEEPAK GUPTA
RACHEL S. BLOOMEKATZ
Gupta Wessler PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
matt@guptawessler.com

Counsel for Respondent

October 3, 2016

QUESTIONS PRESENTED

1. Whether FEHBA's express-preemption provision, 5 U.S.C. § 8902(m)(1), preempts state laws that restrict carriers from seeking subrogation or reimbursement pursuant to their FEHBA contracts.

2. Whether FEHBA's express-preemption provision, 5 U.S.C. § 8902(m)(1), violates the Supremacy Clause.

TABLE OF CONTENTS

Questions presented i

Table of authorities iii

Introduction 1

Statement 3

Argument 12

I. The lower courts' conflict over FEHBA preemption reflects fundamental disagreements on questions of federalism and agency power 12

II. This case presents an optimal vehicle for deciding the full controversy. 20

III. The Missouri Supreme Court's construction of § 8902(m)(1) and constitutional analysis are correct. 22

Conclusion 29

TABLE OF AUTHORITIES

Cases

Aetna Life Insurance Co. v. Kobold,
135 S. Ct. 2886 (2015) 14

AKM LLC v. Secretary of Labor,
675 F.3d 752 (D.C. Cir. 2012) 27

Altria Group, Inc. v. Good,
555 U.S. 70 (2008) 23

American Airlines, Inc. v. Wolens,
513 U.S. 219 (1995) 28

American Insurance Association v. Garamendi,
539 U.S. 396 (2003) 16

Arthur D. Little, Inc. v. Commissioner of Health and Hospitals of Cambridge,
481 N.E. 2d 441 (Mass. 1985) 28

Bates v. Dow Agrosciences, LLC,
544 U.S. 431 (2005) 14, 23

Bell v. Blue Cross and Blue Shield of Oklahoma,
823 F.3d 1198 (8th Cir. 2016) ..... *passim*

Benton House, LLC v. Cook & Younts Insurance, Inc.,
249 S.W.3d 878 (Mo. App. 2008) 8

Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,
489 U.S. 141 (1989) 16

Buckman Co. v. Plaintiffs' Legal Committee,
531 U.S. 341 (2001) 16

Carter v. Welles-Bowen Realty, Inc.,
736 F.3d 722 (6th Cir. 2013) 26

Chamber of Commerce v. Whiting,
563 U.S. 582 (2011) 16

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 27

Cipollone v. Liggett Group, Inc.,
505 U.S. 504 (1992) 13

Commonwealth of Massachusetts v. U.S. Department of Transportation,
93 F.3d 890 (D.C. Cir. 1996) 27

Crosby v. National Foreign Trade Council,
530 U.S. 363 (2000) 16

CTS Corp. v. Waldburger,
134 S. Ct. 2175 (2014) 23

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,
485 U.S. 568 (1988) 20, 28

Empire HealthChoice Assurance, Inc. v. McVeigh,
396 F.3d 136 (2nd Cir. 2005) 19, 28

Empire HealthChoice Assurance, Inc. v. McVeigh,
547 U.S. 677 (2006) ..... *passim*

Helfrich v. Blue Cross & Blue Shield Association,
804 F.3d 1090 (10th Cir. 2015) 2, 15, 17, 19

Kobold v. Aetna Life Insurance Co.,
309 P.3d 924 (Ariz. Ct. App. 2013).....14, 17

Kobold v. Aetna Life Insurance Co.,
370 P.3d 128 (Ariz. Ct. App. 2016).....2, 18, 19

Lopez-Munoz v. Triple-S Salud, Inc.,
754 F.3d 1 (1st Cir. 2014).....1

Maryland v. Louisiana,
451 U.S. 725 (1981).....13

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996).....13, 17

Michigan v. EPA,
268 F.3d 1075 (D.C. Cir. 2001).....27

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.,
514 U.S. 645 (1995).....23

Smiley v. Citibank (S. Dakota), N.A.,
517 U.S. 735 (1996).....11

Sprietsma v. Mercury Marine,
537 U.S. 51 (2002).....24

U.S. West, Inc. v. FCC,
182 F.3d 1224 (10th Cir. 1999).....27

United States v. Locke,
529 U.S. 89 (2000).....15, 16

United States v. Yazell,
382 U.S. 341 (1966).....28

Wyeth v. Levine,
555 U.S. 555 (2009).....15, 26

Statutes

Federal Employees Health Benefit Act,
5 U.S.C. § 8901 3

5 U.S.C. § 8902(m)(1) 1, 6

5 U.S.C. § 8913 9

Legislative materials

H.R. Rep. No. 95-282 (1977) 5, 7

S. Rep. No. 95-903 (1978) 3, 4, 7, 26

S. Rep. No. 105-257 (1998) 6

Regulatory materials

5 C.F.R. § 890.106 10

5 C.F.R. § 890.106(h) 10, 25

OPM, *Final Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery*, 80 Fed. Reg. 29203 (May 21, 2015) 10

Report of the Comptroller General of the United States, B-164562, *Conflicts Between State Health Insurance Requirements and Contracts of the Federal Employees Health Benefits Carriers* (1975) 4, 5, 10, 26

Constitutional provisions

U.S. Const. Art. VI, cl. 2 27

INTRODUCTION

Though centered on a preemption clause in a little-known federal statute, the Federal Employee Health Benefits Act (FEHBA), 5 U.S.C. § 8902(m)(1), this case implicates fundamental questions about federalism and an agency's power to expand its preemptive reach. Coventry Health Care argues that FEHBA preempts state laws prohibiting insurance carriers from bringing repayment or subrogation claims against tort victims. But FEHBA only preempts state laws that "relate to the nature, provision, or extent of coverage or benefits." *Id.* And, as both this Court and the Office of Personnel Management (OPM) have recognized, the text of FEHBA's preemption clause is ambiguous on the question whether it blocks state repayment and subrogation laws. *See Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 697 (2006); Br. of U.S. as Amicus Curiae at 18, *Nevils v. Group Health Plan*, 492 S.W.3d 918 (Mo. 2016) (addressing § 8902(m)(1)'s "preexisting ambiguity").

This is the second time this case has come before the Court. After the Missouri Supreme Court initially refused to allow FEHBA's ambiguous preemption clause to trample state law, Coventry petitioned for certiorari. Nevils opposed that petition, arguing then that the question of FEHBA's preemptive reach was undeveloped—as was any split. At the time, no other state high court or federal circuit had considered the issue in light of *McVeigh*—the "beacon" by which courts must "steer" in this arena. *Lopez-Munoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 7 (1st Cir. 2014). Other factors also cut against review: the Solicitor General had yet to weigh in, and OPM had not yet injected itself into the fray by passing an unprecedented formal regulation designed to leverage textual ambiguity (and *Chevron* deference) to override a

court's interpretation of an express-preemption clause. There was also no reason to disturb the Missouri Supreme Court's opinion; it hewed closely to *McVeigh* and was grounded in sound principles of statutory construction.

Although the Missouri Supreme Court's decision remains sound, Nevils recognizes that other factors bearing on certiorari have changed. Since the last petition, three more appellate courts have confronted the preemption question and, based on a kaleidoscope of rationales, have concluded that state law must yield to provisions in private insurance contracts. *See Bell v. Blue Cross and Blue Shield of Okl.*, 823 F.3d 1198 (8th Cir. 2016); *Kobold v. Aetna Life Ins. Co.*, 370 P.3d 128 (Ariz. Ct. App. 2016) ("*Kobold II*"); *Helfrich v. Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090 (10th Cir. 2015). Moreover, OPM's express-preemption rule has now become final, squarely implicating this Court's unsettled law over whether an agency may ever receive *Chevron* deference for its interpretation of the scope of an express-preemption clause.

As a result, Nevils concedes that the question presented is now certworthy. In particular, the divergence between the Missouri Supreme Court here and the Eighth Circuit in *Bell* creates an untenable conflict between state and federal courts in the same state. And opposing views from the Tenth Circuit and the Arizona Court of Appeals trigger substantially greater geographic uncertainty over FEHBA preemption. Given the conflicting decisions, Nevils recognizes that, even if Coventry's petition is denied here, these questions could be decided in another case and jeopardize any future recovery for Nevils and the putative class that he represents.

This case, moreover, is admittedly the best vehicle available for finally resolving the important matters im-

plicated by FEHBA's "puzzling" preemption clause, *McVeigh*, 547 U.S. at 680, and OPM's *Chevron*-driven gambit to squelch state law through bureaucratic fiat. Unlike any of the other cases, the Missouri Supreme Court here reached every possible issue. It held that § 8902(m)(1) does not preempt Missouri's anti-subrogation law as a matter of statutory construction and, in the alternative, ruled that § 8902(m)(1) unconstitutionally violates the Supremacy Clause. And it also rejected OPM's bid to turn *Chevron* deference into a tool for dismantling state law. This is the only live case presenting all three issues.

Accordingly, if the Court is inclined to grant certiorari to resolve the split over FEHBA preemption, Nevils acknowledges that this would be a superior vehicle. But make no mistake: The Missouri Supreme Court has twice gotten it right. In *McVeigh*, this Court deemed FEHBA's preemption clause "puzzling" and "unusual"—it is not only ambiguous but also "declares no federal law preemptive," instead purporting to vest private insurance contracts with the power to preempt state law. 547 U.S. at 697-98. For these reasons, the Court stressed that the clause "warrants cautious interpretation" and demands a "modest reading." *Id.* at 697-98. The Missouri Supreme Court did just that.

STATEMENT

1. In 1959, Congress enacted the Federal Employee Health Benefit Act (FEHBA), 5 U.S.C. § 8901 *et seq.*, to establish a program for administering health benefits to federal employees. From its inception, Congress intended the program to work alongside state law. In recognition that "[a]ll states regulate the health insurance business in various and varying ways," S. Rep. No. 95-903, at 7 (1978), Congress intentionally did "not design[]" the federal program "to regulate the insurance business or

override any State regulatory scheme." Report of the Comptroller General of the United States, B-164562, *Conflicts Between State Health Insurance Requirements and Contracts of the Federal Employees Health Benefits Carriers* 15 (1975) (hereinafter "Comptroller Report"). Instead, states continued to hold the "authority to both regulate and tax" those health insurance carriers who participated in the federal program. *Id.* Congress made sure that FEHB carriers well understood their state-law compliance obligations. In a 1970 conference report, it recommended that OPM—then known as the U.S. Civil Service Commission, or CSC—"take appropriate action to inform carriers that the fact that they are administering a Federal contract is no reason for circumventing compliance with applicable State laws." *Id.* at 16.

FEHBA's dual-regulatory design worked well. During the law's "early years," carriers had "few if any problems" complying with both federal and state requirements. S. Rep. No. 95-903, at 7. But in the mid-1970s some states began mandating health-insurance coverage for certain "kinds of benefits and medical practitioners"—"chiropractic[] services" or acupuncture, for instance—not typically covered by FEHB carriers. *See id.* at 2-4. These laws "presented serious problems" for FEHB carriers because they "placed carriers in serious jeopardy of loss of their license in a state unless they were to approve a payment" for a specific type of coverage "not provided under [a FEHB] contract but required by state law." *See id.* at 7.

To address this tension, the carriers urged CSC to act—insisting that the agency "issue a regulation restricting the applicability of State law to FEHB contracts." Comptroller Report at 15. The agency refused. First, it made clear that its "position has been that 'the States have the authority to both regulate and tax health

insurance carriers operating under [FEHBA].'" *Id.* It therefore told carriers that (1) "the FEHB Act was not designed to regulate the insurance business or to override any State regulatory scheme," and (2) "no legal basis exists for CSC to issue a regulation restricting the applicability of State laws to FEHB contracts." *Id.* The agency's lawyers informed the carriers that they did "not agree[]" that "the FEHB Act is exempt from State regulation." *Id.* To the contrary, as CSC's Deputy General Counsel explained, "the legislative history of the FEHB Act . . . indicates that State law should be controlling." *Id.* at 16; *see also id.* at ii (noting that the agency "has consistently taken the position that the States have the authority to regulate [FEHB carrier] plans").

Nevertheless, the agency understood the problem confronting FEHB carriers. These concerns led the Comptroller General (with CSC's blessing) to ask Congress to "consider legislation to clarify its intent as to whether State requirements should be permitted to alter terms of contracts negotiated pursuant to [FEHBA]." *Id.* at 17. Although CSC believed that, standing alone, FEHBA might be capable of "preempt[ing] State and local laws" "based on the Supremacy Clause," it advised Congress that "enforcement of this preemption policy" is not "necessary or desirable." H.R. Rep. No. 95-282, at 3 (1977). Instead, it recommended that Congress adopt a narrower express-preemption provision that "has more limited applicability." *Id.* Such a provision would, in the agency's view, "provide an immediate and permanent statutory solution to the problem of maintaining uniformity of benefits to all enrollees in [FEHB plans]." *Id.* at 3.

In 1978, Congress responded by adding a narrow express-preemption provision to FEHBA:

> The provisions of any contract under [FEHBA] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans to the extent that such law or regulation is inconsistent with such contractual provisions.

5 U.S.C. § 8902(m)(1). The provision was then amended in 1998 to clarify that states could not limit the types of health care organizations that FEHBA carriers could use to provide benefits. *See* S. Rep. No. 105-257, at 15 (1998) ("These changes would affect states that have requirements governing what types of organizations can provide health care when those requirements are different from those under federal contracts."). In its current form, the clause states:

> The terms of any contract under [FEHBA] which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. § 8902(m)(1).

In amending FEHBA to include this provision, Congress explained its intent: Because FEHBA did not give CSC "clear authority to issue regulations restricting the application of state laws when their provisions parallel the provisions in the [agency's] health benefits contracts," the express-preemption clause would "guarantee[] that the provisions of health benefits contracts made under [FEHBA] concerning benefits or coverage[] would preempt any state and/or local insurance laws and

regulations which are inconsistent with such contracts." S. Rep. No. 95-903 at 4.

In Congress's view, "[s]uch a preemption [clause]" was nevertheless "purposely limited and [would] not provide insurance carriers under the program with exemptions from state laws and regulations governing other aspects of the insurance business." *Id.*; *see also* H.R. Rep. No. 95-282 at 4-5 ("The effect of this amendment is to preempt the application of State laws or regulations which specify types of medical care, providers of care, extent of benefits, coverage of family members, age limits for family members, or other matters relating to health benefits or coverage when such laws or regulations conflict with the provisions of contracts under [FEHBA].").

2. As a federal employee, Respondent Jodie Nevils participated in a plan with Coventry serving as Nevils's OPM-approved medical insurance carrier. Pet. App. 2a. On November 2, 2006, Nevils was injured in an automobile accident. *Id.* at 16a. He received medical treatment for his injuries and, consistent with its obligations under the contract, Coventry paid the resulting bills. *Id.* At the time of Nevils's injuries, Coventry's OPM-approved contract directed it to "seek reimbursement or subrogation when an insured obtains a settlement judgment against a tortfeasor for payment of medical expenses." *Id.* at 45a.

After Nevils recovered from his injuries, he initiated a tort action against the negligent driver who caused the accident. The parties reached a settlement. *Id.* at 16a. Coventry (through its agent) then asserted a lien on the settlement funds for the medical bills it paid—a total of $6,592.24. *Id.* And Nevils paid the reimbursement amount to Coventry. *Id.*

In February 2011, Nevils filed suit in Missouri state court against Coventry, on behalf of himself and others

similarly situated, alleging that the insurer had improperly obtained reimbursement for medical benefits it paid because Missouri law prohibited its health insurers from demanding reimbursement from the settlement recoveries of injury victims. *Id.* at 29a-30a, 31a-32a; *see Benton House, LLC v. Cook & Younts Ins., Inc.*, 249 S.W.3d 878, 882 (Mo. App. 2008). Coventry defended the suit by arguing that FEHBA's preemption clause, § 8902(m)(1), preempts Missouri law.

3. The Missouri Supreme Court rejected Coventry's broad reading of § 8902(m)(1) and held that FEHBA does not preempt Missouri's state law prohibiting subrogation or reimbursement. The court's starting place was this Court's decision in *McVeigh*. Pet. App. 48a. As the Missouri Supreme Court explained, *McVeigh* "recognized that the FEHBA preemption clause is subject to plausible, alternate interpretations" on the question whether it preempts state laws that limit reimbursement or subrogation. *Id.* at 49a (citing *McVeigh*, 546 U.S. at 697). One could read the contract's reimbursement clause "as a condition or limitation on 'benefits' received by a federal employee," making the clause a "'contract term[] relating to coverage or benefits' and 'payments with respect to benefits,' thus falling within § 8902(m)(1)'s compass." *McVeigh*, 547 U.S. at 697. (alterations omitted). "On the other hand," the Court explained, "§ 8902(m)(1)'s words may be read to refer to contract terms relating to the *beneficiary's* entitlement (or lack thereof) to Plan payment for certain health-care services he or she has received, and not to terms relating to the carrier's postpayments right to reimbursement." *Id.* Given this ambiguity, the Missouri Supreme Court applied the presumption against preemption, and declined to displace Missouri's historic power over insurance and tort law. *Id* at 51a, 54a.

The court further held that its narrow reading of § 8902(m)(1) comported with well-established practice in insurance law. *Id.* at 53a. The "subrogation provision in favor of [Coventry] creates a contingent right to reimbursement and bears no immediate relationship to the nature, provision or extent of Nevis' insurance coverage and benefits," as required for FEHBA preemption. *Id.* Indeed, it noted, "Nevils would have been entitled to the same benefits had he never filed suit to recover damages for his injuries." *Id.* So subrogation and repayment may affect the parties' "net financial position *after* the provision of benefits," but it does not "affect the scope of coverage or the receipt of benefits." *Id.*

Judge Wilson, joined by Judge Breckenridge, concurred in the judgment. They concluded that "the preemption language in § 8902(m)(1) is not a valid application of the Supremacy Clause" and, "as a result, it has no effect." *Id.* at 56a. Reading § 8902(m)(1)'s plain language, they reasoned that Congress "plainly intended" to give the terms in Coventry's *contract* preemptive effect. *Id.* at 65a. But the "supremacy clause assigns primacy solely to federal *law*" and not to contracts later negotiated by federal agencies and private parties. *Id.* at 67a. "The idea that Congress claims the power to authorize the executive branch and private insurance companies to negotiate contract terms that Congress decrees—sight unseen—shall 'preempt and supersede' state law is such an unprecedented and unjustified intrusion on state sovereignty that it almost defies analysis." *Id.* at 66a.

Coventry petitioned for certiorari.

4. While Coventry's petition was pending, OPM jumped into the fray. Purporting to exercise its power under FEHBA's generic grant of agency authority to "prescribe regulations necessary to carry out this chapter," 5 U.S.C. § 8913, OPM issued a regulation directly

targeting the preemption issue in this case. *See* 5 C.F.R. § 890.106. In its final rule, the agency expansively interpreted FEHBA's preemption clause to preclude state subrogation and reimbursement laws. *See* OPM, *Final Rule, Federal Employees Health Benefits Program; Subrogation and Reimbursement Recovery*, 80 Fed. Reg. 29203 (May 21, 2015); 5 C.F.R. § 890.106(h). The new regulation provides:

> A carrier's rights and responsibilities pertaining to subrogation and reimbursement under any FEHB contract relate to the nature, provision, and extent of coverage or benefits (including payments with respect to benefits) within the meaning of 5 U.S.C. 8902(m)(1). These rights and responsibilities are therefore effective notwithstanding any state or local law, or any regulation issued thereunder, which relates to health insurance or plans.

Id.

The agency directed that its interpretation would "apply in any pending or future case." 80 Fed. Reg. at 29204. It offered no justification for its about-face, saying nothing to reconcile the new rule with its earlier position that, given FEHBA's general grant of rulemaking authority, "no legal basis exists" for the agency to issue "regulation[s] restricting the applicability of State laws to FEHB contracts." Comptroller Report, at 15.

In the wake of this intervening rule, the Solicitor General recommended that this Court remand the case to the Missouri Supreme Court. *See* Br. of U.S. as Amicus Curiae in support of petitions for certiorari at 12, *Coventry Health Care v. Nevils* and *Aetna Life Ins. v. Kobold* (Nos. 13-1305, 13-1467). Although the government claimed that OPM's regulation was "entitled to the full measure of deference under *Chevron*," it suggested

allowing the lower court "to consider in the first instance the question presented in light of the[] new regulations." *Id.* The Court remanded "for further consideration in light of new regulations promulgated by [OPM]." Pet. App. 73a.

5. On remand, the Missouri Supreme Court recognized that OPM's regulation does not—under this Court's precedents—deserve *Chevron* deference, and hence it had no reason to change its previous opinion. Pet. App. 5a. The majority opinion, signed by five of the seven judges, acknowledged the distinction between agency interpretation of "'the substantive (as opposed to pre-emptive) *meaning* of a statute'" and "'the question of *whether* a statue is pre-emptive.'" *Id.* at 9a (quoting *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 744 (1996)). It observed that "*Chevron* has been applied repeatedly to determine the substantive meaning of a statute," based on—as here—general grants of agency authority to administer a statutory scheme. *Id.* at 5a.

But, the Missouri Supreme Court observed, "there is no indication that Congress delegated to the OPM the authority to make binding interpretations of the scope of the FEHBA preemption clause." *Id.* at 3a. And particularly without such a delegation, there is no U.S. Supreme Court authority holding that "*Chevron* deference applies to resolve ambiguities in a preemption clause." *Id.* at 5a.

Rather, the court explained that the "OPM rule does not alter the fact that the FEHBA preemption clause does not express Congress's clear and manifest intent to preempt Missouri's anti-subrogation law." *Id.* at 13a. And in light of that conceded uncertainty in § 8902(m)(1), the court again concluded that the presumption against preemption and the "cautious interpretation" mandated by this Court, *McVeigh*, 547 U.S. at 697, required upholding the State's law. Pet. App. 7a.

Judge Wilson, now joined by five other judges, concurred on the grounds that FEHBA's "attempt to give preemptive effect to provisions of a contract between the federal government and a private party is not a valid application of the Supremacy Clause." *Id.* at 14a. Accordingly, in addition to the statutory construction described above, a majority of judges also opined that "for all of the reasons stated in" Judge Wilson's previous concurrence, their holding could be alternatively supported based on the Supremacy Clause violation.

6. Coventry again petitioned for certiorari, challenging both the statutory construction and the Supremacy Clause holdings.

ARGUMENT

I. The lower courts' conflict over FEHBA preemption reflects fundamental disagreements on questions of federalism and agency power.

Nevils does not deny that there is a split over whether FEHBA's express-preemption provision displaces state laws that prohibit insurance carriers from seeking reimbursement or subrogation from tort victims. The Missouri Supreme Court held that FEHBA preemption does *not* reach that far. Pet. App. 2a. And in doing so, it openly acknowledged that it was parting ways with the Arizona Court of Appeals and the Tenth Circuit. *Id.* at 12a ("declin[ing] to follow" *Kobold* and *Helfrich*).[1]

---

[1] Coventry overstates the split by including the Georgia Supreme Court's decision in *Thurman v. State Farm Mutual Automobile Insurance Company*, 598 S.E.2d 448 (Ga. 2004). Pet. at 15. That case was decided before *McVeigh*, and, in any event, did not decide the preemption issue here. In *Thurman*, the carrier and injured federal employee *agreed* that the carrier was entitled to reimbursement, so the court only decided whether "funds from an insurance policy that are used to cover the subrogation claims of the federal

(continued ...)

Then, several months after the Missouri Supreme Court's decision here, the Eighth Circuit weighed in, disagreeing with the Missouri Supreme Court and opening a split between the state and federal courts in Missouri. *Bell*, 823 F.3d at 1204.

This conflict between the lower courts reveals deep uncertainty about fundamental questions that strike at the heart of the delicate balance between state and federal authority. Lower courts are not only split over the outcome—*i.e.*, whether § 8902(m)(1) bars state anti-subrogation laws—but they are also at odds over the reasons why. Resolving the split thus also means resolving broader matters of federalism and administrative power.

A. The division in authority over § 8902(m)(1) reflects an increasing disagreement over when to apply the presumption against preemption. As the Missouri Supreme Court recognized, preemption analysis "'starts with the basic assumption that Congress did not intend to displace state law.'" Pet. App. 6a (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). That is particularly true when Congress has intruded upon an area traditionally occupied by the states because "the states' historic police powers are not preempted unless it is the clear intent of Congress to preempt state law." *Id.* (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). In that context, the Missouri Supreme Court explained, "when two plausible readings of a statute are possible," courts "'nevertheless have a duty to accept the

---

government, as claimant's employer, [are] counted in the calculation of 'available coverages' for purposes of the Georgia Uninsured Motorists Statute." 598 S.E.2d at 450. The answer to that state-law question has no bearing on the preemption question here.

reading that disfavors pre-emption.'" Pet. App. 6a-7a (quoting *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005)).

The court found the presumption directly applicable here. Not only did this Court in *McVeigh* "recognize[] that the FEHBA preemption clause is subject to plausible, alternate interpretations," but it also warned that the provision's "unusual" prescription "warrants [a] cautious interpretation." Pet. App. 7a. Given these instructions, the Missouri Supreme Court held that Congress could not be said to have "expressed its clear and manifest intent that the purposes of FEHBA require the preemption of state anti-subrogation laws." *Id.* That conclusion was only reinforced by Coventry's claim for "dispositive deference to the new OPM rule," because—the Missouri Supreme Court aptly observed—the quest for *Chevron* deference "is a tacit admission that Congress did not express its clear and manifest intent" to preempt state anti-subrogation laws. *Id.*

The Arizona Court of Appeals has also held that the presumption applies. *See Kobold v. Aetna Life Ins. Co.*, 309 P.3d 924, 927 (Ariz. Ct. App. 2013) ("*Kobold I*"), *cert. granted, judgment vacated*, 135 S. Ct. 2886 (2015). Although it later determined that OPM's rule overrode both its initial conclusion and otherwise applicable canons of statutory interpretation, when it originally considered the issue the Arizona court began by "noting that preemption is disfavored." *Id.* Citing *Bates*, the court recognized that "when two plausible readings of a statute are possible, 'we would nevertheless have a duty to accept the reading that disfavors pre-emption.'" *Id.*

The two federal courts that have considered the issue, by contrast, have cast the presumption aside. In *Helfrich*, the Tenth Circuit acknowledged that this Court in *McVeigh* determined that FEHBA's express-

preemption provision "is ambiguous regarding the preemptive effect of reimbursement clauses." 804 F.3d at 1104. Yet it held that the "presumption does not apply here." *Id.* In its view, a "federal-interest exception to the general presumption against preemption" allowed the presumption to be discarded. *Id.* On that theory, the court reasoned, because the "preemption provision does not affect the relationships between private citizens" and "governs only contracts for the benefit of federal employees," the "federalism concern (respecting state sovereignty) behind the presumption . . . has little purchase in this case." *Id.* at 1105.

The Eighth Circuit in *Bell* held much the same thing. *See* 823 F.3d at 1201. Although it recognized that "health care in general is an area of traditional state regulation," it saw this case as "concern[ing] benefits from a federal health insurance plan for federal employees that arise from a federal law" and in which "[t]here is obviously a long history of federal involvement." *Id.* at 1201-02. "Whatever the force of the presumption against preemption as an interpretive tool," it reasoned, the canon "should not apply where 'considerable federal interests' are at stake.'" *Id.* (quoting *United States v. Locke*, 529 U.S. 89, 94 (2000)). It therefore found "no warrant to place a thumb on the scales against preemptive effect of the federal statute." *Id.*

The division among these four lower courts over the application of the presumption against preemption to FEHBA's ambiguous express-preemption clause is plainly ripe for review. This Court has, in the past, refused to discard the presumption based on either the existence of distinct federal interests or a long history of federal regulation in the area—precisely the reasons given by the Eighth and Tenth Circuits for rejecting the canon's application to FEHBA. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (dismissing claim that

the presumption "should not apply" because the federal government had "regulated drug labeling for more than a century," and noting that the argument "misunderstands the principle"—which "accounts for the historic presence of state law but does not rely on the absence of federal regulation").

Yet, at the same time, the Court has signaled that, in certain pockets of "*uniquely* federal areas of regulation," the presumption likely does not apply. *Chamber of Commerce v. Whiting*, 563 U.S. 582, 604 (2011) (emphasis added); *see, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401, 405-06 (2003) (presidential conduct of foreign policy); *Locke*, 529 U.S. at 108 (maritime commerce); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373-74 (2000) (foreign affairs power); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) (fraud on a federal agency); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 143-44 (1989) (patent law).

Resolving this unsettled issue is critical in cases where, as here, the statutory language is subject to multiple plausible readings.

B. Adding to the disagreement, courts interpreting § 8902(m)(1)—even those reaching the same outcome with respect to § 8902(m)(1)—hold varying views on another major unresolved issue: whether *Chevron* deference applies to an agency's regulation construing the scope of a statute's express-preemption provision.

The Supreme Court of Missouri, as described above, held that it did not owe *Chevron* deference to OPM's interpretation of FEHBA's express-preemption clause. Pet. App. 5a. The court's decision was rooted in the need for express authority from Congress when an agency interprets the scope of its authority to preempt state laws generally rather than applicable substantive law. "The

fact that an agency regulation can have preemptive effect" through an interpretation of substantive statutory terms, the court explained, "does not mean that courts must defer to an agency rule purporting to define the preemptive scope of a statute administered by the agency." *Id.* at 10a n.3. Because interpreting the preemption clause implicates the careful federal-state balance of power, the Missouri Supreme Court held that it was not bound to defer to the agency's self-interested interpretation. *Id.* at 12a.

Both the Eighth Circuit and Tenth Circuit, however, sidestepped this question, in the process noting that "[t]he law concerning application of *Chevron* to an agency's view on preemption is unsettled." *Bell*, 823 F.3d at 1202. The Tenth Circuit, after surveying the relevant law, concluded that it was unclear whether OPM's regulation was entitled to more than "some weight" but refused to decide if *Chevron* deference applied. *Helfrich*, 804 F.3d at 1109. For the Eighth Circuit, it was "not clear that the law has evolved materially" since Justice O'Connor openly doubted that an agency regulation "determining the pre-emptive effect of any federal statute is entitled to deference." *Bell*, 823 F.3d at 1203 (quoting Justice O'Connor's concurrence in *Lohr*, 518 U.S. at 512). But, "like the Tenth Circuit in *Helfrich*," the Eighth Circuit held that it was "unnecessary to decide" whether OPM's regulation warranted *Chevron* deference because, in its view, "the better reading of the statute is that Arkansas law is preempted." *Id.*

The Arizona Court of Appeals, by contrast, was unable to skirt the *Chevron* question. It had already held, in *Kobold I*, that the better reading of § 8902(m)(1) was a narrow one, that state anti-subrogation laws fall "outside the scope" of the preemption provision's reach. 309 P.3d at 928. And it had also held that earlier informal efforts by OPM to require deference to a "contrary interpreta-

tion" were unpersuasive. *Id.* (refusing to accord *Chevron* deference to an informal agency letter). But, after reconsidering this view in light of OPM's newly final rule, it flipped. *See Kobold II*, 370 P.3d at 131 (holding that "the OPM regulations qualify substantively for *Chevron* deference").

In reaching this result, the Arizona Court of Appeals did not explain why it believed *Chevron* deference was appropriate for an agency's interpretation of a preemption provision. Instead, the court simply concluded that its hands were tied: Because OPM's interpretation was not *unreasonable*, the court believed *Chevron* deference "compels us to apply OPM's interpretation even though we view the analysis of *Kobold I* and *Nevils* as more faithful to the text of the statute." *Id.* at 131.

The upshot: there is an outcome-determinative split on the unsettled question whether *Chevron* deference attaches to agencies' interpretations of preemption provisions in the statutes they administer. One court has refused to accept OPM's bid for *Chevron* deference over its expansive interpretation of an ambiguous express-preemption clause, two courts have punted, and a fourth applied *Chevron* deference to displace state law even though, in its view, a more "faithful" reading of the statute respects state sovereignty.

C. Lastly, although most courts did not address the Supremacy Clause issue, the question whether Congress can endow the terms of possible future contracts with preemptive power is squarely presented here, and has profound implications for the Constitution's protection of federalism.

Coventry asserts that there is a conflict in authority over whether § 8902(m)(1) violates the Supremacy Clause. Pet. 30-32. That overstates the point. A six-judge majority of the Missouri Supreme Court has concluded

that § 8902(m)(1) violates the Supremacy Clause because the Constitution gives supreme power only to "laws," not contract terms. Pet. App. 12a. And then-judge Sotomayor flagged the issue when *McVeigh* was before the Second Circuit, explaining that "by unambiguously providing for preemption by contract," FEHBA's preemption provision is "highly problematic, and probably unconstitutional, because only federal *law* may preempt state and local law." *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 143 (2nd Cir. 2005). There, in an effort to avoid the problem, the Second Circuit construed FEHBA to mean that "*federal law*"—not federal-government contracts with private insurers—preempts state law. But this Court did not adopt that rationale upon review in *McVeigh*, instead avoiding the issue altogether. This Court has therefore never had occasion to directly address the issue, leaving an open question.

Nevertheless, no other court evaluating the preemptive nature of § 8902(m)(1) since *McVeigh* has squarely addressed this question. The Eighth Circuit, for example, avoided finally deciding the issue because it held that the argument was waived below, and thus "forfeited." *Bell*, 823 F.3d at 1204. In dicta, the court registered its doubt that the provision was unconstitutional, noting that a court could adopt the "savings" construction like the one suggested by the Second Circuit in *McVeigh* itself. *Id.* But superficial musings about an explicitly forfeited constitutional argument are hardly enough to create a split. *See also Helfrich*, 804 F.3d at 1110 (expressing that it was "skeptical" of Supremacy Clause challenge, but because plaintiff "did not raise this argument below," the court "need not address it."); *Kobold II*, 370 P.3d 128 (not addressing Supremacy Clause issue).

Even without a clear split, the Supremacy Clause implications of an express-preemption clause that en-

dows private contracts with preemptive power is undeniably important. In *McVeigh*, this Court pointedly recognized that "FEBHA's preemption prescription . . . is unusual in that it renders preemptive contract terms in health insurance plans, not provisions enacted by Congress." *McVeigh*, 547 U.S. at 697. As a result, it delivered clear instructions about handling such a provision: "A prescription of that unusual order warrants cautious interpretation." *Id.* In the decision below, the Missouri Supreme Court faithfully followed these instructions. But a state's invalidation of a duly enacted federal statute—as here—is an important consideration for certiorari review. And the issue is unavoidable: The Court would have to resolve the constitutionality if FEHBA's express-preemption provision is to stand.

II. This case presents an optimal vehicle for deciding the full controversy.

If the Court is inclined to grant certiorari to resolve these unsettled issues, Nevils acknowledges that this case provides an optimal vehicle.

Most importantly, this case—as opposed to *Bell*, in which a petition for certiorari is forthcoming—squarely presents both the statutory-interpretation and Supremacy Clause questions. As Coventry notes, both issues were "thoroughly pressed and passed upon below." Pet. 35. This Court need not address the Supremacy Clause question if it agrees with the Missouri Supreme Court regarding § 8902(m)(1)'s construction. The narrow reading of § 8902(m)(1) required by this Court's jurisprudence would appropriately allow FEHBA to coexist with Missouri's reimbursement and subrogation laws, obviating the need to decide whether § 8902(m)(1) is unconstitutional in its entirety. And the canon of constitutional avoidance counsels that approach. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*,

485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

But, even if the Court disagrees on this point, it would need to reach the Supremacy Clause issue to harmonize the law between the federal and state courts in Missouri (and elsewhere). At present, *Bell* is the only other live case with the possibility of certiorari review. But it did not reach the Supremacy Clause question. *See Bell*, 823 F.3d at 1204. So, if this Court simply affirmed the Eighth Circuit's construction of § 8902(m)(1) (but declined to reach the Supremacy Clause question), the Missouri Supreme Court's conclusion that the provision is unconstitutional would remain intact—allowing the uncertainty surrounding the constitutionality of FEHBA's preemption clause to linger. Because a majority of judges on the Missouri Supreme Court joined Judge Wilson's concurrence opining that § 8902(m)(1) violates the Supremacy Clause, the court's holding could rest on constitutional grounds alone. In Missouri, then, the fate of the state's subrogation laws would continue to depend on whether a suit was filed in state or federal court.

In addition, the Eighth Circuit in *Bell* likewise failed to decide the question of *Chevron* deference. 823 F.3d at 1202 (noting only that the "application of *Chevron* to an agency's view on preemption is unsettled"). By contrast, the issue was thoroughly briefed and passed upon in the Missouri Supreme Court below. That court's decision provides concrete reasoning supporting its conclusion that *Chevron* does not apply here. As with the Supremacy Clause question, leaving the *Chevron*-deference issue unresolved does little to resolve the uncertainty surrounding these issues. This case is therefore a superior

vehicle for resolving the important federalism questions at stake.

III. The Missouri Supreme Court's construction of § 8902(m)(1) and constitutional analysis are correct.

The Missouri Supreme Court has twice thoroughly considered the reach of FEHBA's preemption provision. After reviewing this Court's decision in *McVeigh*, the text of FEHBA's preemption clause, the statute's considerable legislative history, and the relevant canons of statutory interpretation, the court correctly concluded that § 8902(m)(1) does not preempt state anti-subrogation laws. Following remand, the court also correctly refused to allow OPM to overturn that result by agency fiat. Absent express delegation from Congress, the court held that federal agencies do not have the authority to expand the scope of an express preemption clause, and courts are "not required to afford dispositive deference" to such an effort. Pet. App. 10a n.3. That holding also avoided a serious constitutional incursion. As a supermajority of the court explained, "FEHBA's attempt to give preemptive effect to the provisions of a contract between the federal government and a private party is not a valid application of the Supremacy Clause." *Id.* at 14a (Wilson, J., concurring). These conclusions are all correct.

A. At this point, there should be no serious dispute that the text of FEHBA's preemption clause is ambiguous. This Court said so explicitly in *McVeigh* when it concluded that § 8902(m)(1) is open to more than one "plausible construction[]." *See* 547 U.S. at 697-98. OPM, too, has said the same thing. *See* Br. of U.S. as Amicus Curiae at 18, *Nevils v. Group Health Plan*, 492 S.W.3d 918 (Mo. 2016) (discussing § 8902(m)(1)'s "preexisting ambiguity").

Given this textual ambiguity, our system of dual sovereignty demands a "reading that disfavors preemption." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). As this Court has repeatedly explained, one must "assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'" *Bates*, 544 U.S. at 449. The "effect of th[e] presumption," in other words, "is to support, where plausible, 'a narrow interpretation' of an express pre-emption provision." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2189 (2014) (Kennedy, J., concurring).

That is "especially" true when, as here, "Congress has legislated in a field traditionally occupied by the States.'" *Id.* (quoting *Altria*, 555 U.S. at 77). The twin areas of regulation at issue—insurance law and tort remedies—easily meet this definition. *See, e.g., New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (holding that health insurance is a "field[] of traditional state regulation" to which "presumption against pre-emption" applies); *CTS Corp.*, 134 S. Ct. at 2189 (Kennedy, J., concurring) ("In our federal system, there is no question States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit."). *See also Bell*, 823 F.3d at 1201 (recognizing that health care "is an area of traditional state regulation").

In truth, this Court itself has all but mandated "a narrow interpretation" of FEHBA's express-preemption clause. Coventry asserts that the Missouri Supreme Court's interpretation of § 8902(m)(1) "departs fundamentally from this Court's teaching," Pet. 19, but that gets things exactly backwards. In *McVeigh*, after calling the provision "unusual" and "puzzling," the Court issued a cautionary directive: Given the clause's ambiguity and its declaration that terms in private contracts are preemptive, "a modest reading of the provision is in or-

der." 547 U.S. at 698. The narrow interpretation adopted below faithfully follows this instruction.

Reading § 8902(m)(1) "modest[ly]" makes even more sense in light of the rich historical evidence demonstrating that the law—from its inception—was designed precisely to avoid trampling state regulatory regimes. Both Congress and CSC repeatedly made clear that FEHBA was "not designed to regulate the insurance business or override any State regulatory scheme." Comptroller Report, at 15. Instead, states continued to hold the "authority to both regulate and tax" those health insurance carriers who participated in the federal program. *Id.* And Congress itself even told carriers that they had "no reason for circumventing compliance with applicable State laws."

Similarly limiting language was used to describe the passage of § 8902(m)(1). Far from "sweeping" (as Coventry describes it), the provision was "purposely limited" and, beyond the specifically identified benefit and provider laws, not intended to "provide insurance carriers . . . with exemptions from state laws and regulations" governing other matters. S. Rep 95-903, at 3.

Coventry ignores nearly all of this background, opting instead to argue that Congress's reference to uniformity and cost savings somehow overrides the actual limiting language that Congress used in the conference reports. Pet. 22-23. This Court has repeatedly rejected exactly this kind of argument before. Uniformity motivates literally every express-preemption clause, but that does not mean that every express-preemption clause displaces all state law. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 70 (2002) (holding that, in absence of clear Congressional intent, "the concern with uniformity does not justify the displacement of state common-law remedies"). Instead, the question is how much of a balance

Congress intended to strike between a State's right to regulate and protect its citizenry, and the federal government's desire to displace that ability. *Altria*, 555 U.S. at 76 ("If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains.").

Here, Congress (and OPM) understood that carriers would have to tolerate state insurance regulation. With § 8902(m)(1), Congress intended to preempt—and promote uniformity—only for a clear subset of state laws: those regulating substantive benefits or coverage issues. The Missouri Supreme Court was right to reject Coventry's bid for more.

B. The Missouri Supreme Court also properly rejected OPM's unprecedented effort to override this conclusion. In *McVeigh*, this Court dealt the agency a major blow—rejecting OPM's claim that § 8902(m)(1) is "clear" and "no doubt" displaces "state laws that would affect the right to reimbursement." Br. of U.S. as Amicus Curiae at 20, *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006) (No. 05-200). But the agency has now doubled down in its attempt to expand its preemptive reach: In a transparent play for *Chevron* deference, OPM issued a formal regulation in the midst of this litigation. While conceding the textual ambiguity of FEHBA's express-preemption clause, OPM's rule purports to compel an expansive construction of FEHBA's preemption clause—one that authorizes contractual provisions in carrier contracts to displace state laws that OPM has long fought to evade. *See* § 890.106(h).

OPM's play for *Chevron* deference in the absence of congressional authority is misguided. Congress has in no way delegated OPM the authority to expand or interpret

FEHBA's express-preemption clause. Quite the opposite: As OPM's predecessor agency itself acknowledged at the time of § 8902(m)(1)'s enactment, "no legal basis exist[ed]" for it "to issue a regulation restricting the applicability of State laws to FEHB contracts." Comptroller Report, at 15. And it told Congress that, despite FEHBA's generic grant to "prescribe regulations to implement th[e] law," the statute "does not give [the agency] clear authority to issue regulations restricting the application of state laws." S. Rep. No. 95-903, at 4.

Yet OPM has now reversed course. Without any explanation for its shift, the agency asserts that the same generic grant of authority that precluded preemption by regulation forty years earlier now specifically authorizes it. This Court has specifically rejected similar "dramatic change[s] in [agency] position," especially when (as here) it centers on preemption. *See Wyeth*, 555 U.S. at 579. Because agencies are creatures of Congress, an agency wishing to interpret an express-preemption clause to preempt state law may validly do so only if Congress has expressly "authorized" it "to pre-empt state law directly." *Id.* at 576. FEHBA contains no such command.

Making matters worse, in its zeal to short-circuit the legislative and judicial process, OPM's regulation blithely tosses aside—without so much as a passing reference—bedrock principles of statutory construction that have long animated preemption jurisprudence. The "critical" point in any statutory interpretation case—one that "transcends debates about the mechanics of *Chevron*"—is that "[r]ules of interpretation bind all interpreters, administrative agencies included." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring). Interpretive principles—which include "[a]ll manner of presumptions, substantive canons and clear-statement rules"—"take precedence over conflicting agency views." *Id.* at 731.

That holds true for agency efforts to override the presumption against preemption, *Comm. of Mass. v. U.S. Dep't of Transp.*, 93 F.3d 890, 895 (D.C. Cir. 1996), and it holds true where an agency advances an interpretation that "raises serious constitutional concerns," *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999). Because OPM's regulation is openly at war with these principles—indeed, its *raison d'etre* is to overturn them—*Chevron* does not sanction its enforcement.

Resolving disputes over a statute's meaning is ordinarily the job of the courts. Agency deference is the exception to this rule, but it is not something to which an agency is entitled simply through "[m]ere ambiguity in a statute," *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001), or because it has "expressed an interpretation in the proper form," *AKM LLC v. Secretary of Labor*, 675 F.3d 752, 765 (D.C. Cir. 2012) (Brown, J., concurring). To the contrary, it is Congress's "delegation of authority to the agency to elucidate a specific provision of the statute" that permits an agency's interpretation to be given deference at all. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). It is crucial that this Court safeguard this requirement, especially on questions directly implicating the delicate balance between state and federal sovereignty. OPM invites this Court to relax the limitations on its power and, in the process, to radically expand the ability of unelected bureaucrats to displace the federalism our Constitution demands. That invitation should be declined.

C. Finally, the Missouri Supreme Court was right to reject the idea that private contractual terms can preempt State laws—because the Supremacy Clause says no such thing. The Supremacy Clause of the Constitution states that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary

notwithstanding." U.S. Const. Art. VI, cl. 2. By its terms, § 8902(m)(1) provides that certain contractual terms will "supersede and preempt" state laws in a particular field. There is no constitutional authority for doing so.

The Supremacy Clause does not permit contract terms between private parties to reign "supreme" over state law. *See Arthur D. Little, Inc. v. Comm'r of Health and Hosps.*, 481 N.E. 2d 441, 452 (Mass. 1985) ("[T]his court has been unable to locate authority in this or any jurisdiction which supports the proposition that a contract to which the Federal government is a party somehow constitutes Federal law for purposes of the supremacy clause."); *United States v. Yazell*, 382 U.S. 341, 353 (1966) ("None of the cases in which [the Supreme Court] has devised and applied a federal principle of law superseding state law involved an issue arising from an individually negotiated contract."). A "Law," as used in the Supremacy Clause, "connotes official, government-imposed policies, not the terms of a private contract." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 n.5 (1995); *see also id.* at 241 (O'Connor, J., concurring in part and dissenting in part) (noting that, "[t]o be sure, the terms of private contracts are not laws"). And "FEHBA-authorized contracts" "are not" laws. *McVeigh*, 396 F.3d at 144. They are instead "privately" negotiated agreements "with insurance providers who are under no obligation to enter into the contracts in the first place." *Id.*

For this reason, embracing a "highly problematic, and probably unconstitutional" reading of FEHBA's preemption clause, as then-Judge Sotomayor put it, *id.* at 143, should give any court pause, and the Missouri Supreme Court's decision to reject such a reading was both prudent and correct. *See DeBartolo*, 485 U.S. at 575. It concluded, consistent with FEHBA's legislative history and this Court's cautionary warning, that the

"statute's attempt to give preemptive effect to the provisions of a contract between the federal government and a private party is not a valid application of the Supremacy Clause"—a conclusion that this Court should embrace.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MATTHEW WESSLER
Counsel of Record
DEEPAK GUPTA
RACHEL S. BLOOMEKATZ
Gupta Wessler PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
matt@guptawessler.com

RALPH K. PHALEN
Phalen Law
4310 Madison Avenue
Suite 140
Kansas City, MO 64105

MITCHELL L. BURGESS
Burgess Law Firm, PC
4310 Madison Avenue
Suite 100
Kansas City, MO 64111

JOHN CAMPBELL
Campbell Law, LLC
20 South Sarah Street
St. Louis, MO 63108

October 3, 2016